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No. 87-1695

In The

Supreme Court of the United States

October Term, 1987

GREAT LAKES DREDGE & DOCK COMPANY,

Petitioner,

vs.

CHEVRON TRANSPORT CORPORATION
CHEVRON SHIPPING COMPANY, and
VIVIAN MARIE SELF, ETC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S CHEVRON TRANSPORT CORPORATION, AND CHEVRON SHIPPING COMPANY'S BRIEF IN OPPOSITION

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GREAT LAKES DREDGE & DOCK COMPANY,

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vs.

CHEVRON TRANSPORT CORPORATION
CHEVRON SHIPPING COMPANY, and
VIVIAN MARIE SELF, ETC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Chevron Transport Corporation and Chevron Shipping Company respectfully request that this court deny the Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case entered on December 1, 1987.

STATEMENT OF THE CASE

In 1974 the U.S. Army Corps of Engineers engaged Great Lakes Dredge and Dock Company, owner of the dredge Alaska, to deepen the Jacksonville ship channel in the St. Johns River in Jacksonville Florida. Pursuant to its contract the dredge Alaska undertook dredging activities in the St. Johns River. The stern of the dredge was "spuded" down near the midline of the channel and the dredge pivoted around the spuds with the cutter head sweeping from side to side across the channel. On the morning of February 5, 1975 the inbound tanker Robert Watt Miller, owned by Chevron Transportation Corporation and managed by Chevron Shipping Company arrived in Jacksonville from Port Everglades Florida. The pilot navigating the Robert Watt Miller[1] radioed ahead stating that the tanker would arrive in the Alaska's vicinity in approximately twenty minutes. The dredge responded and gave the tanker permission to pass port to port.

Shortly before noon the Robert Watt Miller rounded the Broward Point turn and proceeded towards the Drummond Creek range and the dredge Alaska. Upon obtaining a visual sighting of the dredge, the Robert Watt Miller set a course close to the north side of the channel to allow sufficient room to pass the dredge. The leverman on the Alaska, seeing the approaching tanker, ceased the dredging activities and swung the bow of the dredge towards the south bank of the channel such that

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[1] Jacksonville is a compulsory pilotage port. As required, a local pilot had boarded the vessel at the sea bouy for transit up river.

the dredge lay at an angle to the centerline of the channel. The stern remained "spuded" near the centerline. As the Robert Watt Miller proceeded up the north side of the channel a significant sheer to the port developed, drawing the vessel towards the south. Despite the efforts of the Pilot and Captain, the Robert Watt Miller was unable to overcome the sheer, and tragically, collided with the dredge resulting in the death of two crewmembers on the dredge and injuries to several others. All personal injury claimants, with the exception of Self, settled with both Great Lakes and Chevron.

The trial judge found the Robert Watt Miller largely at fault for the collision with the Alaska. In reaching this decision the court applied the rule of *The Oregon*, 158 U.S. 186 (1895) creating a presumption of negligence on the part of a moving vessel which has collided with an anchored vessel. The court also applied the rule found in *Atkins v. Lorentzen*, 328 F.2d 66, 68 (5th Cir. 1964), presuming negligence on the part of a sheering vessel which has collided with another vessel. Unable to overcome these presumptions, the trial court found Chevron and the Robert Watt Miller partially at fault in the collision.

The trial court also found actual fault on the part of Great Lakes for the collision. The positioning of the dredge Alaska was determined to be in violation of 33 C.F.R. § 80.26 (1974) requiring that a dredge, having given an approaching vessel a signal that the channel is clear, shall straighten out within the cut for passage of the vessel. Based on the violation of this federal

regulation the trial court applied the rule of *The Pennsylvania, The Steamship Pennsylvania v. Troop*, 86 U.S. 125 (1874) was construed by the 5th and 11th Circuits.[2] Further, the court found as a matter of fact that the positioning of the dredge in violation of the federal regulation distorted the Robert Watt Miller's perception of the centerline of the channel causing it to proceed too close to the channel's northern edge. This the court held, was a causative factor in the sheer and the resulting collision.

Thereafter, applying the principles laid down in *United States v. Reliable Transfer, Co.*, 421 U.S. 397 (1975), the trial court apportioned fault for the collision 70% to Chevron and the tanker Robert Watt Miller, and 30% to Great Lakes and the dredge Alaska.

All parties appealed the trial court's decision. On appeal, the Eleventh Circuit Court of Appeals reviewed the District Court's decision and affirmed as to its findings of liability and its application of the various presumptions and apportionment of fault.

In the instant petition Great Lakes asks this Court to grant certiorari to determine the continued validity of *The Pennsylvania* rule.

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[2] *Orange Beach Water, Sewer & Fire Protection Authority v. M/V Alva*, 680 F.2d 1374 (11th Cir. 1982); *Garner v. Cities Service Lake Corp.*, 456 F.2d 476 (5th Cir. 1922); *Compania Madera de Caibarien v. The Queenston Heights*, 220 F.2d 122 (5th Cir. 1955) *cert. denied* 350 U.S. 824.

REASONS FOR DENYING THE WRIT

1. **In view of the finding below of substantial actual fault on the part of Great Lakes, consideration of the continued validity of the Pennsylvania rule in connection with this action presents a purely academic, moot issue, not properly cognizable by the Court.**

2. **No conflict exists among the circuits concerning the validity of The Pennsylvania rule, and no substantial and important question is presented by the instant petition requiring the attention of this court.**

The rule established by this court in *The Steamship Pennsylvania v. Troop*, 86 U.S. 125 (1874) is presented for review by the petitioner. *The Pennsylvania* rule provides that in the event of a collision, a vessel determined to be in violation of a statutory rule intended to prevent collisions must show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been [a cause of the collision]." *Id.* at 136. The petitioner characterizes *The Pennsylvania* rule as an inflexible, inequitable relic and asks this Court to discard it as it has discarded other maritime jurisprudential antiques such as the divided damages rule. *United States v. Reliable Transfer*, 421 U.S. 397 (1975).

In determining whether certiorari should be granted it is respectfully submitted that this court should consider a principal of even greater vintage than *The Pennsylvania* rule, requiring that this Court refrain from consideration of purely academic issues, non-essential to the decision in the particular case

before it. *Lord v. Veazie*, 49 U.S. (8 How.) 1067 (1850); *Chamberlain v. Cleveland*, 66 U.S. (1 Black) 93 (1862); *American Wood Paper Co. v. Heft*, 75 U.S. (8 Wall.) 378 (1869); *San Mateco Co. v. Southern Pac. R. Co.*, 116 U.S. 138 (1885); *Gordon v. United States*, 117 U.S. 697 (1864); *Little v. Bowers*, 134 U.S. 547 (1890); *People of the State of California v. San Pablo and T.R. Company*, 149 U.S. 308 (1893); *Mills v. Green*, 159 U.S., 651 (1895); *Codlin v. Kohlhausen*, 181 U.S. 151 (1901); *American Book Company v. Kansas*, 193 U.S. 49 (1904); *Berry v. Davis*, 242 U.S. 468 (1917); *Heitmuller v. Stokes*, 256 U.S. 359 (1921); *Alejandrino v. Quezon*, 271 U.S. 528 (1926); *Willing v. Chicago Auditorium Association*, 277 U.S. 274 (1928); *Aetna Life Insurance Co. of Hartford Conn. v. Haworth*, 300 U.S. 227 (1937); *Amalgamated Assn. v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 416 (1951); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *North Carolina v. Rice*, 404 U.S. 187 (1971).

This case and controversy requirement for exercise of Supreme Court jurisdiction is derived from the Constitution itself; Article III Section 2. Throughout the Court's history this judicial limitation has been strictly adhered to despite frequent attempts to expand the court's jurisdictional base. *See Singer Manufacturing Company v. Wright*, 141 U.S. 696 (1891); *United States v. Hamburg American Line*, 239 U.S. 446 (1916); *State of Kansas v. Burelson*, 250 U.S. 188 (1919); *United States v. Alaska S.S. Co.*, 253 U.S. 113 (1920); *Brownlow v. Schwartz*, 261 U.S. 216 (1923) and cases cited above.

As early as 1793 Chief Justice Jay declined an invitation from then Secretary of State Jefferson to provide the executive with advise regarding "important questions of the construction of treaties, laws of nation and laws of the land, which the secretary said were often presented under circumstances which 'do not give a cognizance of them to the tribunals of the country.' " *Muskrat v. United States*, 219 U.S. 346 (1911) discussing *Hayburns' case,* 2 U.S. (2 Dall) 436 (1792) and *United States v. Ferreira*, 54 U.S. (13 How.) 42 (1851).

The petitioner asks this court to consider and overrule the presumption of causation under *The Pennsylvania* rule in an action in which fault was established, not based solely upon *The Pennsylvania* presumption, but by specific findings of causation and fault. Factual determinations which have been approved by both the District Court and Appellate Court are accorded great weight and, absent extremely unusual circumstances, will not be disturbed by this Court. *National Collegiate Athletic Association v. Board of Regent of the University of Oklahoma*, 468 U.S. 85 (1984); *United States v. Doe*, 465 U.S. 605 (1984); *Branti v. Finkel*, 445 U.S. 507 (1980); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Berenyi v. Immigration Director*, 385 U.S. 630 (1967).

The district court found, not only that Great Lakes' positioning was in violation of 33 C.F.R. § 80.26 (1974) but that the violation caused a misperception of the channel by the Robert Watt Miller. This misperception forced the tanker to navigate too near the northern bank of the channel resulting in the sheer and collision. Based on this factual determination the court below

found the actions of the dredge to have been a substantial cause (30%) of the collision. This finding of actual substantial fault moots petitioners basis for urging reconsideration of *The Pennsylvania* rule by this court.

Petitioner examines at length criticism regarding *The Pennsylvania* rule in situations in which courts have attempted to ease its burden upon a mariner guilty of a minor or technical statutory violation. *Seaboard Tug and Barge Inc. v. Rederi AB/Disa*, 213 F.2d 772 (1st Cir. 1954); *Tempest v. United States*, 404 F.2d 870 (4th Cir. 1968); *The Choctaw* 129 F.2d 618 (2d Cir. 1942); *National Bulk Carriers v. United States*, 183 F.2d 405 (2d Cir. 1950), *cert. denied*, 340 U.S. 865 (1950); *Compania de Madera de Caibarien v. The Queenston Heights*, 220 F.2d 120 (5th Cir. 1955), *cert denied*, 350 U.S. 824 (1955) (Petition of Great Lakes p. 8).

The Court in this instance, however, is not presented with a minor or mere technical violation of a statutory rule. The positioning of the dredge Alaska was found by the trier of fact to have contributed substantially (30%) to the collision. Where such a significant percentage of liability for a collision has been assigned to the violating vessel, the "judicial buffers" referred to by the petitioner (petition of Great Lakes p. 8) do not come into play. The petitioner seeks to equate the instant action to those predominently pre-*Reliable Transfer*[3] cases involving insignificant statutory violations, where strict application of *The Pennsylvania* rule

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[3] 421 U.S. 397 (1975). As recognized by the 11th Cir., the harshness of *The Pennsylvania* rule ebbed when combined

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would have lead to an inequitable result. Where application of the ameliorative doctrines discussed above is not an issue, however, as it is not in this case, the hypothetical conflicts which might arise from their suggested inconsistent application may not be relied upon as grounds for invoking this courts Certiorari jurisdiction.

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Mills v. Green, 159 U.S. 651 (1895); *American Book Company v. Kansas*, 193 U.S. 49 (1904).

In order to constitute a "controversy" appropriate for judicial determination, "the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *South*

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with the pre-*Reliable Transfer* rule of *The Schooner Catherine* 58 U.S. (17 How.) 170 (1885) requiring an equal division of damages. Prior to *Reliable Transfer* a ship that violated a statutory rule but could not overcome *The Pennsylvania* burden would be liable for an equal share of the damages caused by the collision, even though the violation only marginally contributed to the collision.

Spring Gold Co. v. Amador Gold Co., 145 U.S. 300 (1892); *Texas v. Interstate Commerce Commission*, 258 U.S. 158 (1922); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *New York v. Illinois*, 274 U.S. 488 (1927); *United States v. West Virginia*, 295 U.S. 463 (1934); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Aetna Life Insurance Company of Hartford Connecticut v. Haworth*, 300 U.S. 227 (1937).

The instant action presents no controversy necessitating a determination by this court of the viability of *The Pennsylvania* rule. The specific findings of actual fault made by the trial court and affirmed by the appellate court, eliminate the need for reliance upon the presumption created by *The Pennsylvania* and moot the petitioners basis for challenge of the rule. *Crown Zellerbach Corp. v. Wilamette-Western Corp.*, 519 F.2d 1327 (9th Cir. 1975); *Nehus v. Alaska Marine Towing Inc.*, 519 F. Supp. 328 (W.D. Wash. 1981). *See also Bernent Towboat Company v. USS Chandler* (DDG 996), 666 F. Supp. 1454 (D. Or. 1987).

This court has consistently rejected the invitation to decide issues nonessential to the disposition of the case before it, regardless of the convenience of deciding a question for the governing of future cases. *Singer Manufacturing Company v. Wright*, 141 U.S. 696 (1891). *Amalgamated Ass'n Etc. v. Wisconson Employ. Rel. Bd.* 340 U.S. 416 (1951). Apportionment of fault in the collision was determined by the District Court not only according to *The Pennsylvania* presumption but to presumptions established in *The Oregon*, 158 U.S. 186 (1895), of similar vintage to *The Pennsylvania*, and *Atkins v. Lorentzen*, 328 F.2d 66, 68 (5th Cir. 1964).

Despite the heavy burdens placed by the presumptions of *The Oregon* and *Atkins* decisions on the Robert Watt Miller, sufficient evidence was introduced to rebut a significant portion of liability for the collision, and demonstrate actual fault of 30% on the part of the petitioner, Great Lakes. The trial judge was well aware of the burdens placed on the parties by virtue of the respective presumptions (petitioner's appendix p. 53a). Weighing these presumptions and the evidence introduced, liability was apportioned, not according to any anachronistic formula or antiquated presumption but according to evidence of the actual fault of the parties.

The petitioner requests that this court discard *The Pennsylvania* rule because of its harshness, inflexibility and inconsistent application in certain instances. In view of the District and Circuit court's finding of actual fault, however, these issues are necessarily mooted. As this court has repeatedly done in the past, it should now reject the petitioners invitation to deliberate on an issue non-essential to the disposition of the case before it.

Secondly, the petitioner attempts to portray the various circuits as hopelessly lost in a quagmire of ameliorative doctrines designed to cushion the harsh impact of *The Pennsylvania* rule. In reality, however, there is no conflict among the circuits as to the rule's continued validity, though its applicability to particular factual settings has been rejected. *Orange Beach Water, Sewer and Fire Protection Authority v. M. V. Alva*, 680 F.2d 1374, 1381 (11th Cir. 1982); *Self Towing, Inc. v. Brown Marine Services, Inc.*, 837 F.2d 1501 (11th Cir. 1988); *Candies Towing Company, Inc. v. M/V B & C*

Eserman, 673 F.2d 91 (5th Cir. 1982); *Florida East Coast Ry. Co. v. Revilo Corp.*, 637 F.2d 1060 (5th Cir. 1981); *Capt'n Mark v. Sea Fever Corp.*, 692 F.2d 163 (1st Cir. 1982); *Hellenic Lines Ltd. v. Prudential Lines Inc.*, 813 F.2d 634 (4th Cir. 1987); *First National Bank of Chicago v. Material Services Corp.*, 597 F.2d 1110 (7th Cir. 1979); *Alter Barge Line Inc. v. TPC Transportation Co.*, 801 F.2d 1026 (8th Cir. 1986).

The numerous "judicial buffers" recited by the petitioner including the major-minor fault rule, the passive action doctrine, the rule of reasonable probabilities, the last clear chance doctrine, conditions versus causation test, and the interest of judgment and clear fault exceptions, are all portrayed as examples of conflicting or at least inconsistent variations of *The Pennsylvania* rule. (Petition of Great Lakes p. 8-10). They are more appropriately characterized, however, as vehicles for circumvention of the divided damages rule of the *Schooner Catherine*, 58 U.S. (17 How.) 170 (1855) whereby, a vessel guilty of only a minor statutory violation would be forced to bear an inequitable share of the damages caused by the collision, rather than inconsistent application of *The Pennsylvania* rule. *The Great Republic*, 90 U.S. (23 Wall.) 20 (1874); *Tempest v. United States*, 404 F.2d 870 (4th Cir. 1968); *Seaboard Tug and Barge Inc. v. Rederi A/B Disa*, 213 F.2d 772 (1st Cir. 1954); *The Choctaw* 129 F.2d 618 (2d Cir. 1942); *Socony-Vacuum Oil Co. v. Smith*, 179 F.2d 672 (5th Cir. 1950); *The Bellhaven*, 72 F.2d 206 (2d Cir. 1934).

In *Reliable Transfer*, this court, overruling *The Schooner Catherine*, held that liability for damages in a

maritime collision should be allocated among the parties proportionate to the comparative degree of their fault. Since *Reliable Transfer*, the prospect of the inequitable distribution of damages in collision cases has been eliminated along with the divided damages rule.[4] In the post *Reliable Transfer* era, therefore, a vessel violating a statutory provision designed to prevent collisions is assigned only that degree of fault and liability for the collision which actually resulted from the statutory violation. The plethora of ameliorative doctrines cited by the petitioner are simply no longer a concern, and the conflict which they are alleged to have created among the jurisdictions is illusory.

Despite claims by its critics that the rule itself is an inflexible and drastic doctrine, see *In re Gypsum Carrier*, 465 F.Supp. 1050, 613 (S.D. Ga. 1979) *The Pennsylvania* rule has not been applied without moderation. A vessel guilty of a statutory violation has not been required to prove that "its fault could not by any stretch of the imagination have any causal relation to the collision, no matter how speculative, improbable or remote." *The Umbria*, 166 U.S. 404 (1897); *China Union Lines v. A.O. Anderson Co.*, 364 F.2d 769 (5th Cir. 1966), *cert. denied* 386 U.S. 933; *Compania de Madera de Caibarien v. The Queenston Heights*, 220 F.2d 120, 122 (5th Cir. 1955); *First National Bank of Chicago v. Material Service Corp.*, 597 F.2d 1110 (7th Cir.

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[4] This court's criticism of *The Pennsylvania* rule in *Reliable Transfer* is limited as well to the result obtained when the rule is applied in conjunction with the dividend damages rule. 421 U.S. at 405, 95 S.Ct. 1708.

1979); *Pacific Tow Boat Co. v. States Marine Corp. of Delaware*, 276 F.2d 745 (9th Cir. 1960); *Seaboard Tug and Barge v. Rederi AB/Disa*, 213 F.2d 772 (1st Cir. 1954); *Guidry v. LeBeouf Bros. Towing Co. Inc.*, 398 F.Supp. 952 (E.D. La. 1975).

The Pennsylvania rule both in theory and in application performs a valuable function in encouraging safety in maritime navigation. As accurately observed by the Eleventh Circuit "the need to strictly enforce maritime rules is as strong today as it was in 1874, and *The Pennsylvania* decision announced 100 years ago still further[s] that purpose." (petitioner's appendix p. 31a).

CONCLUSION

As the finding of actual fault on the part of Great Lakes below renders moot considerations regarding the viability and application of *The Pennsylvania* rule to the instant action, there is no conflict among the circuits as to the viability and construction of *The Pennsylvania* rule, and no public policy reason exists for invalidating the rule as it is being construed, there is no basis for the issuance of a Writ of Certiorari by this court to re-examine the rule as urged by the petitioner. The petition should, therefore, be denied.

Respectfully submitted,

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